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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re IVAN V., a Person Coming
Under the Juvenile Court Law.

B293454
(Los Angeles County
Super. Ct. No. DK10029)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

NICHOLAS V.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles
County, Karin Borzakian, Juvenile Court Referee. Affirmed.

Linda B. Puertas, under appointment by the Court of Appeal,
for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

Nicholas V. (Father) appeals from the denial of his Welfare and Institutions Code¹ section 388 petition. He contends the trial court abused its discretion in denying his request for custody of his 11-year-old son Ivan or reinstatement of reunification services. We affirm.²

FACTUAL AND PROCEDURAL BACKGROUND

A. Petition and Detention Hearing

On October 31, 2014 the Los Angeles County Department of Children and Family Services (the Department) received a referral alleging Erika D. (Mother) neglected Ivan. The caller reported

¹ Further statutory references are to the Welfare and Institutions Code.

² In his notice of appeal, Father also appeals from the order terminating his parental rights, as well as numerous other orders from 2017 and 2018. As to many of these orders, the appeal is not timely. In any event, Father has forfeited his challenges to the other orders by not addressing them in his opening brief. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal “may therefore be deemed waived”]; *Cox v. Bonni* (2018) 30 Cal.App.5th 287, 311 [plaintiff waived arguments not addressed in her opening brief]; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136 [appellant forfeited challenge to issue not raised on appeal].)

Father and Mother argued over her alcohol use. During the argument, Mother bit Father's back and shoulders and scratched his arms. Ivan witnessed the incident, but was not injured. After investigating the referral, the social worker determined there was a "high risk" for future neglect based on the denial by Mother and Father of any domestic violence and Mother's history of drug and alcohol use. The Department allowed Ivan to remain in Father's care after Father agreed to domestic violence counseling and drug testing and to protect Ivan by obtaining a restraining order against Mother. Father told the investigating social worker that his drug test results likely would show low levels of marijuana because he used it for medical reasons.

On November 18, 2014 the Department filed a petition on behalf of then six-year-old Ivan pursuant to section 300, subdivisions (a) and (b)(1). The petition alleged Mother struck Father, causing injuries to him in Ivan's presence, and on October 31, 2014 Mother was arrested for inflicting corporal injury on a spouse (counts a-1 and b-1). The petition also alleged Mother abused alcohol (count b-2), and Father abused marijuana (count b-3).

At the November 18, 2014 detention hearing, the juvenile court detained Ivan from Mother's custody and released him to Father. The court ordered the Department to make unannounced home visits. In addition, the court ordered that Ivan not be left alone with the paternal grandmother. The juvenile court took jurisdiction over the case Father filed against Mother seeking a domestic violence restraining order. At a February 11, 2015 hearing, the court issued a one-year restraining order protecting Father from Mother.

B. *Jurisdiction and Disposition Hearing*

At the March 4, 2015 jurisdiction and disposition hearing, the juvenile court sustained the amended allegations in count b-1 of the petition that on October 31, 2014 Mother struck Father, causing injuries to him while she was intoxicated and under the influence of alcohol; that Mother was arrested for inflicting corporal injury on a spouse; and that Mother's conduct placed Ivan at substantial risk of serious physical harm. The court also sustained the allegations in count b-3 that Father had a history of substance abuse and was a current abuser of marijuana, which rendered him incapable of providing Ivan with regular care and supervision and endangered Ivan's physical health and safety. The court dismissed without prejudice counts a-1 and b-2 against Mother in the interest of justice.

The juvenile court declared Ivan a dependent of the court under section 300, subdivision (b)(1). The court ordered Ivan placed in Father's home under the supervision of the Department. The court ordered monitored visitation for Mother, but Father could not serve as the monitor. The court also ordered the Department to provide Father with family maintenance services. Father was required to participate in random or on demand consecutive drug tests, age appropriate parenting classes, individual counseling to address case issues of domestic violence and marijuana use, and conjoint counseling with Ivan if recommended by Ivan's therapist. In addition, the court ordered Father to obtain a marijuana card for his medical marijuana use. The court prohibited Father from smoking in the home with Ivan, and ordered Father to ensure there was no smoke residue on his clothing that could trigger Ivan's asthmatic attacks.

C. *Supplemental Petition and Detention Hearing*

On March 24, 2015 the Department filed a supplemental petition under section 387. The supplemental petition alleged Father allowed Mother to have unmonitored visits with Ivan in violation of the court's orders. It also alleged that on March 17, 2015 Father was arrested and incarcerated on robbery charges and was unable to provide care and supervision of Ivan. On March 19, 2015 the Department had placed Ivan with V.R., a nonrelated extended family member.

At the March 24, 2015 detention hearing, the juvenile court detained Ivan from Father, and vested temporary placement and custody with the Department. The court granted Father monitored visits upon his release from custody.

D. *Adjudication Hearing on Supplemental Petition*

At the April 23, 2015 adjudication hearing, Father pleaded no contest to count s-2 of the amended supplemental petition.³ The juvenile court sustained the allegations that Father was arrested and incarcerated on March 17, 2015, and he was unable to provide care and supervision of Ivan, placing the child at risk of harm.⁴

The court removed Ivan from Father's custody and ordered the Department to provide Mother and Father with family reunification services. The court ordered Father to submit to

³ Count s-2 was amended to delete reference to Father's robbery charges, and to strike the allegations that Father endangered Ivan's physical health and safety and placed Ivan at risk of physical harm, damage and danger.

⁴ The court dismissed count s-1, which alleged Father allowed Mother to have unmonitored visits with Ivan in violation of court orders.

random or on demand consecutive drug tests, with the Department to monitor the levels of Father's marijuana use to ensure they did not exceed therapeutic levels. In addition, the court prohibited Father from smoking in the home. The court also ordered Father to participate in a parenting program and individual counseling to address domestic violence and marijuana use. Further, the court again ordered that Father could not serve as the monitor for Mother's visits.

E. *Six-month Status Review Report and Hearing*

The October 23, 2015 six-month status review report stated Father was still incarcerated and did not have a release date. On May 5, 2015, while he was incarcerated, Father began participating in a program, which included parenting and anger management classes and drug education. The report stated Ivan missed Father and enjoyed visiting him in jail. Ivan felt happy and safe in V.R.'s home. The social worker recommended Father continue to receive family reunification services.

At the October 23, 2015 six-month review hearing, the juvenile court found Mother was in partial compliance with her case plan. The court found Father was in compliance with his case plan. The court set the 12-month review hearing for March 24, 2016.

F. *Twelve-month Status Review Report and Hearing*

The March 24, 2016 12-month review report stated Father remained incarcerated and did not have a release date. Father reported he completed a parenting program and was participating in a parent in partnership program and counseling at the correctional facility. When the social worker told Father that the paternal grandfather wanted Ivan placed with him, Father

questioned the placement because the paternal grandfather had a violent criminal history. Father did not feel comfortable with Ivan being placed in the paternal grandfather's care, especially because Ivan was thriving in his current placement with V.R. Ivan wanted to remain in V.R.'s care if he was unable to return to Mother's custody. V.R. wanted to adopt Ivan if family reunification was unsuccessful.

The social worker recommended termination of the parents' family reunification services. The social worker acknowledged Father was in compliance with the case plan and continued to participate in programs at the correctional facility, but his criminal case was ongoing. Father was expecting to serve at least seven years if he was not successful at trial, which made it difficult for the Department to plan his reunification with Ivan.

The July 25, 2016 interim review report indicated Ivan remained placed with V.R. After an April 8, 2016 court hearing, Ivan witnessed the paternal family verbally assault Mother. A week later, Ivan had a couple of incidents with another student, for which Ivan was almost expelled from school. On May 29, 2016 Ivan refused to visit Father at the correctional facility. Ivan said he did "not feel" like visiting Father and did not like to see him in jail. The social worker continued to recommend termination of the parents' family reunification services.

At the July 25, 2016 12-month review hearing, Father objected to termination of his family reunification services. Father's counsel reported Father's expected release date was early 2018. The juvenile court noted Father's incarceration "hurts his chances of reunifying with his son under the court's jurisdiction." The court commended Father for his participation in programs in prison to improve his parenting skills, but found Father was not in

compliance with the case plan because of his incarceration. The court terminated Mother's and Father's family reunification services. The court set a section 366.26 selection and implementation hearing for November 28, 2016.

G. *Section 366.26 Report*

The November 28, 2016 section 366.26 report recommended adoption as the permanent plan for Ivan. While in V.R.'s care, Ivan was happy, healthy, and sociable, and he excelled in school. V.R. and her husband wanted to adopt Ivan and could provide him with a safe and happy environment. V.R.'s son and Ivan met while they were in the first grade together, and they considered themselves brothers. When Ivan's family moved out of the neighborhood, Mother brought Ivan back to V.R.'s home where Ivan spent the night and participated in outings with V.R.'s family. V.R. did not object to future visitation between Ivan and his parents, and she told Ivan she "would never stop him from seeing his mother and father."

H. *Initial Section 366.26 Hearing*

After multiple continuances, the juvenile court held the initial section 366.26 hearing on February 1, 2018. Ivan was 10 years old at the time of the hearing. Ivan's counsel indicated Ivan wanted to be placed with his maternal grandparents and have them be his legal guardians so that Mother and Father could retain their parental rights. The court requested briefing on Ivan's request for legal guardianship and the maternal grandmother's contention the Department failed to assess her for placement in a timely manner. The court found good cause to continue the section 366.26 hearing over the Department's objection.

I. *Ivan's Request for Placement with Maternal Grandparents*

On February 7, 2018 Ivan filed a section 388 petition requesting placement with the maternal grandparents, with the grandparents later becoming his legal guardians. As of January 27, 2018 the maternal grandparents had completed CPR training and 12 hours of preapproval training for "Resource Family Approval." Ivan wanted to be placed with his biological family because he had ties to them.

On February 8, 2018 Ivan filed a request for Title XX service logs⁵ from October 23, 2015 to March 24, 2016. Ivan's counsel sought the logs to determine whether the Department delayed assessing the maternal grandparents for relative placement. The Department approved the maternal grandparents as monitors for Mother's visits in early 2016, but did not assess them for placement until June 2017. At the February 9, 2018 hearing, the court granted Ivan's request and ordered the Department to provide the Title XX service logs to all counsel.

On March 2, 2018 Ivan filed a request for a section 361.3 hearing for placement with his maternal grandparents. Ivan contended the Department failed to assess the maternal grandparents for placement when the court detained Ivan from Father. Ivan objected to adoption by V.R. because he wanted to live with his biological family. The maternal grandparents monitored Mother's visits with Ivan every other week, except when Mother

⁵ Title XX service logs are the Department's logs documenting all contacts, services, and visits. The juvenile court had previously denied Ivan's request for Title XX service logs for the periods from November 2014 to November 2015 and January 2017 to January 2018.

was incarcerated from July to September 2017. In addition, Ivan enjoyed visiting Father every other Sunday at a conservation camp, located on land that had livestock and an area for inmates and their families to gather outdoors. During the visits, Father often times grilled food outside, and he and Ivan played basketball and other games together. Father filed a brief supporting Ivan's placement with the maternal grandparents; the Department opposed the request.

On April 23, 2018 the juvenile court held a hearing on Ivan's request for placement with the maternal grandparents. The parties stipulated Ivan's testimony would be incorporated into the section 366.26 hearing. Ivan testified on three separate days.

Ivan stated that before he lived with V.R., he knew her because he lived across the street and was best friends with her son David. He liked living with V.R., but preferred living with his maternal grandparents "[m]ostly because [he] hardly [got] to see them. . . ." He started wanting to live with his maternal grandparents about two to three months earlier and was willing to start at a new school. Ivan felt close to his maternal grandparents, felt safe with them, had fun during his visits, and enjoyed seeing his other maternal relatives. He also felt close to his paternal grandparents and enjoyed his time with them and Father. He did not want to be adopted by V.R.

Ivan testified he looked forward to the visits with Father. The paternal grandmother and paternal great-grandmother took him to the visits. They would arrive around 9:00 a.m. and leave at 2:30 p.m. During visits, he played board games, ran around, and went to the pond with Father. They ate food and had barbeques together. Ivan enjoyed the visits and loved Father. He would miss

Father if he did not get to see him again. Ivan looked forward to Father's release, which was in four months.

On June 18, 2018 the juvenile court denied Ivan's request to be placed with the maternal grandparents, noting that Ivan was doing well with V.R., with whom he had lived for more than three years.

J. *Father's Section 388 Petition*

On August 16, 2018 Father filed a section 388 petition, requesting custody of Ivan or reinstatement of his family reunification services. Father contended he made progress on his case plan by enrolling in services during his incarceration, including drug education, anger management classes, and a parenting program. In addition, on August 16, 2018 he had been released from custody, although he was on parole, and he had made suitable arrangements to live with the paternal great-grandmother. Father argued the request would be in Ivan's best interest because Ivan opposed adoption, wanted to be placed with his family, and had a close bond with Mother, Father, and his other relatives.

K. *Last Minute Information for the Court*

The September 26, 2018 last minute information for the court stated Father had visited Ivan three times since his release from custody five weeks earlier. Father requested visitation with Ivan every other Friday with his approved monitor, the paternal great-grandmother, from 3:30 to 8:30 p.m. The social worker reported Mother had sent harassing text messages and threatened V.R.; she disrupted Ivan's class time by coming to school unannounced; she suggested to Ivan that he would be coming home with Mother; and she failed to confirm her visits in advance. Ivan was scared of

Mother's behavior and suggested V.R. contact the police. Ivan felt safe, comfortable, and cared for in V.R.'s home. The social worker recommended termination of parental rights.

The September 28, 2018 last minute information for the court stated Ivan now wanted to be adopted by V.R. because Mother showed up unannounced and threatened Father during his Friday visit with Ivan. According to Ivan, Mother screamed and "got out of control," and Ivan "was very disappointed and scared." Ivan said, "[Father] just stood there holding me and covering my ears." Ivan changed his mind about adoption because he "felt like it was going to be too much to continue [c]ourt and everything." He felt good and safe in V.R.'s home. Ivan indicated he was excited about going to Mexico with V.R. and her family.

L. *Hearing on Father's Section 388 Petition*

At the October 2, 2018 hearing on the section 388 petition, Father requested a continuance to obtain the results of a bonding study that was scheduled to begin the next day. The study had been set up by Ivan's counsel, not the court. Ivan's counsel stated she was no longer in favor of the bonding study because Ivan wanted to proceed with adoption. The court denied a continuance, finding the bonding study was not appropriate in light of Ivan's change in position and the delay the study would cause.

After considering the documents attached to Father's section 388 petition, the September 26 and 28, 2018 last minute information to the court reports, and argument of counsel, the juvenile court denied the section 388 petition. The court noted most of the documents submitted by Father to show completion in programs were from 2015 and 2016, prior to termination of family reunification services on July 25, 2016. The court explained even if

it were to find changed circumstances because of Father's release from custody, and even overlooking that Father was on parole, Father failed to establish it would be in Ivan's best interest for Father to have custody or reinstatement of family reunification services. Ivan had been placed with V.R. since March 19, 2015, and he had bonded with V.R. and her son. V.R. and her family wanted to adopt Ivan, and Ivan wanted to be adopted by V.R. The court reasoned granting Father's section 388 petition would not promote Ivan's need for permanency and stability.

M. Section 366.26 Hearing

The juvenile court held the section 366.26 hearing on October 15 and 16, 2018. After hearing testimony from Mother, Father, the paternal grandmother, and the paternal great-grandmother, as well as argument of counsel, the juvenile court found by clear and convincing evidence that Ivan was likely to be adopted. The court terminated parental rights, finding Mother and Father had not shown any statutory exceptions to adoption, including the parent-child relationship exception.

Father timely appealed the trial court's denial of his section 388 petition.

DISCUSSION

"Once [reunification] services have been terminated, the juvenile court's focus shifts from family reunification to the child's permanent placement and well-being [Citations.] A parent may regain custody after reunification services have been terminated only by a showing that changed circumstances demonstrate a return to parental custody is in the child's best

interests.” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235; accord, *In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Alayah J.* (2017) 9 Cal.App.5th 469, 478 [“After reunification services have been terminated, it is presumed that continued out-of-home care is in the child’s best interests. [Citation.] Section 388 allows a parent to rebut that presumption by demonstrating changed circumstances that would warrant modification of a prior court order.”].)

Under section 388, subdivision (a)(1), a parent may petition for a hearing to change, modify, or set aside any previously made order based on a change of circumstance or new evidence. A petitioner requesting modification under section 388 has the burden of proving by a preponderance of the evidence that the child’s welfare requires the change. (Cal. Rules of Court, rule 5.570(h)(1)(D) [“All other requests require a preponderance of the evidence to show that the child’s welfare requires such a modification.”]; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Alayah J., supra*, 9 Cal.App.5th at p. 478.) “The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612; accord, *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) We review the juvenile court’s determination of the child’s best interest for an abuse of discretion. (*In re Stephanie M.*, at p. 318; *In re Alayah J.*, at p. 478.)

Father contends the trial court abused its discretion in denying his section 388 petition. He argues because his incarceration was the reason Ivan was removed from his custody, his release from jail was a changed circumstance. In addition, Father asserts reinstatement of reunification services or return of Ivan to his custody is in Ivan’s best interest.

The Department contends Father's circumstances have not changed because he had not addressed the domestic violence issues that brought the family to the attention of the Department, and Father allowed Mother to have contact with Ivan in violation of the juvenile court's orders. But as acknowledged by the Department, the juvenile court removed Ivan from Father's custody after Father's incarceration. Therefore, Father's release from custody was a changed circumstance that satisfied the first prong under section 388.

However, the juvenile court did not abuse its discretion in finding Father failed to show it would be in Ivan's best interest for Father to have custody of Ivan or reinstatement of reunification services. At the time of the October 2, 2018 section 388 hearing, Ivan was 10 years old. He had been living with his prospective adoptive mother, V.R., for over three-and a half years, since his March 19, 2015 placement with her. V.R. provided Ivan with a safe, loving, and nurturing home, and he thrived in her care. Ivan excelled academically, regularly participated in extra-curricular activities, and was best friends with V.R.'s son. V.R. was deeply committed and loyal to Ivan and wanted to adopt him. Although Ivan initially was opposed to adoption because he wanted to maintain ties with his biological family, he later changed his mind after a September 14, 2018 visit at which Mother threatened Father. Ivan reported Mother "got out of control," and the incident made him "very disappointed and scared." When asked why he changed his mind about adoption, Ivan explained, "I just felt like it was going to be too much to continue [c]ourt and everything. I feel good here and I feel safe." Given that Ivan was thriving in V.R.'s care and had a stated desire for safety, stability, and permanency in

his life, the juvenile court did not abuse its discretion in denying Father's section 388 petition.

DISPOSITION

The juvenile court's order denying the section 388 petition is affirmed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.